NO. 22509

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

— —

RANK J. EVANS and ARGUERITTE A. EVANS, Appellants, v. OMMISSIONER OF INTERNAL REVENUE, Appellee.	)

APPELLANT'S OPENING BRIEF

---

ppeal from the Decision of the Tax Court of the United States, onorable Norman O. Tietjens, Judge. (Decision Reviewed by the ourt).

NOLAND, HAMERLY, ETIENNE & FULTON
333 Salinas Street, P.O. Box 849
Salinas, California 93901
Counsel for Appellants

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RANK J. EVANS and	)
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ARGUERITTE A. EVANS,	)
	)
Appellants,	)
	)
v.	)
	)
OMMISSIONER OF INTERNAL REVENUE,	)
	)
Appellee.	)
	)

APPELLANTS' OPENING BRIEF

STATEMENT OF JURISDICTION

1.

Statutory Basis for Jurisdiction

Jurisdiction of the Tax Court of the United States (Tax Court) n this action arose pursuant to 28 U.S.C. 7442, (1964) 28 U.S.C. 212, (1964) and 28 U.S.C. 6213, (1964). Jurisdiction of this ourt is based upon 28 U.S.C. 7482(a), (1964).

2.

Pleadings Establishing Jurisdiction

The Office of the Regional Commissioner of Internal Revenue, ppellate Division, San Francisco, California, issued a statutory

tice of deficiency to appellant dated June 2, 1966, covering
e years 1962 and 1963(R.5-10). A timely Petition for Redetermina-
on was filed in the Tax Court on June 2, 1966 (R.1-4). Thereafter
e Tax Court entered a decision against the appellants on
ptember 22, 1967 and appellants filed a timely Petition for
view of Decision of the Tax Court on November 14, 1967 (R.90-
).

STATEMENT OF THE CASE

1.

Nature of the Controversy

The appellants dispute a deficiency in Federal income tax for e calendar year 1962 in the sum of $41.21, and a deficiency Federal income tax for the calendar year 1963 in the sum $1,089.35; in addition, appellants contend that they are titled to a refund of Federal income tax for the year 1962 the amount of $1,239.63.

The above deficiencies and the claimed-over assessment e occasioned by the appellants' contention that they are entitled o an investment credit for the four utility systems purchased part of a mobile home park in 1962, which had a cost of at ast $12,500 each, or a total of $50,000 for the four systems.

The only issue for determination is whether the appellants e entitled to an investment credit for all or any part of gas distribution system, for all or any part of an electrical ergy distribution system, for all or any part of a water distribu-on system, and for all or any part of a sewage disposal system, l of which were purchased in 1962 as part of a mobile homes rk which was operated by the appellants in 1962 and 1963.

The 1963 deficiency results from the disallowance of a rry-over of unused investment credit arising in the year 1962.

The Tax Court, in Dec. 28.575, 48 T.C. No. 69 (R.65-80) ld that the appellants were not entitled to the claimed invest-

nt credit, however by virtue of a concession by appellee on other issue, the decision was entered under Rule 50.

THE FACTS

In the Tax Court, the case was submitted on full stipulation d the court stated at 48 T.C. No. 69 Page 2 (R.66) "All of e facts are stipulated, and are so found. The exhibits and cts are included herein by this reference." The facts as stipula- d are as follows:

"1. Frank J. and Margueritte A. Evans, husband and wife, titioners herein, reside at 890 38th Avenue,Santa Cruz, Cali- rnia. (R.16).

"2. Frank J. and Margueritte A. Evans filed joint income tax turns for the years 1962 and 1963 with the District Director Internal Revenue at San Francisco, California. (R.16).

"3. In 1962 the petitioners purchased a used 111 space mobile mes park, Opal Cliffs Mobile Homes Park, for a total purchase ice of $327,000.00. Of the total purchase price, $143,000.00 the cost of the land, and the balance of $184,000.00 is the st of improvements of which at least $12,500 is the cost of ch one of the four utility systems, namely, a natural gas distri- tion system, an electrical energy distrubtion system, a water stribution system, and a sewage disposal system.(R.16-17).

"4. During 1962 and 1963, the petitioners were engaged in e operation of Opal Cliffs Mobile Homes Park, and in connection erewith, operated the four utility systems in the following nner:

(a) The sewage disposal system required no special attention and the charge for its use to each mobile home owner was made as a part of the monthly charge for space. The system in Opal Cliffs Mobile HOmes Park is connected to the East Cliff Sanitation District and is under the control of Santa Cruz County, California.

(b) The water in Opal Cliffs Mobile Homes Park was supplied by the C.L. Beltz Water System, a public utility, operating under authority from the California Public Utilities Commission, Decision No. 20189. Each mobile home owner in Opal Cliffs Mobile Homes Park is charged $2.00 per month for water by the petitioners as part of the monthly charge for space in accordance with the schedule of rates established by the California Public Utilities Commission in their Decision No. 49269 for the sale of water by the C.L. Beltz Water System. The petitioners in turn pay the C.L.Beltz Water System at a monthly rate which averages $50 per month.***

(c) The petitioners purchase all of the electrical energy used in Opal Cliffs Mobile Homes Park from Pacific Gas & Electric Company, and pay for it at a fixed rate. The petitioners in turn supply the electrical energy to the mobile home owners in Opal Cliffs Mobile Homes Park and bills each mobile home owner in accordance with the amount of electrical energy used during the previous month. The petitioners read the meters each month, maintained appropriate records, and billed the mobile home owners for the amount of electrical energy used each month

in accordance with a schedule of rates approved by the California Public Utilities Commission.***

(d) The petitioners operate a natural gas distribution system exactly as outlined in 3(c) (sic) above. (R.17-19).***"

5. The four utility systems have a useful life of twenty years for computing depreciation thereon (R.31).

6. The Federal Income Tax return, Form 1040, filed by the appellants for the year 1962, contained no investment credit (R.20)

7. The amended return, Form 1040 filed by the appellant for the year 1962, contained an investment credit for the four utility systems. The investment credit claimed for the utility systems when coupled with the investment credit for items not in dispute, was $3,696.70 of which $1,152.11 was used to offset the income tax for the year 1962, resulting in an overpayment for that year in the amount of $1,239.63. The refund claimed differs from the investment credit claimed because the net income from the mobile homes park was reduced from $6,657.94 on the original return to $6,215.94 on the amended return, or a difference of $442.00 by adjustments not here in issue. The unused portion of the investment credit from 1962 in the amount of $2,544.59 was carried over to the year 1963 and claimed as a credit to the extent of the full amount of the tax for the year 1963, namely $1,136.34." (R. 31,32,51,57,61 & 62).

STATUTES, REGULATIONS AND CONGRESSIONAL COMMITTEE REPORTS INVOLVED

1. The Internal Revenue Code of 1954, as amended, as it appears at 28 U.S.C. 38 (1964)

"Sec. 38. (a) General Rule - There shall be allowed, as a credit against the tax imposed by this chapter, the amount determined under subpart B of this part.

(b) Regulations.- The Secretary or his delegate shall prescribe such regulations as may be necessary to carry out the purposes of this section and subpart B.

2. The Internal Revenue Code of 1954 as amended, as it appears at 28 U.S.C. 46 (c)(3)(1964)

"(3) Public Utility Property.-

(A) In the case of section 38 property which is public utility property, the amount of the qualified investment shall be 3/7 of the amount determined under paragraph (1).

(B) For purposes of subparagraph (A), the term "public utility property" means property used predonimantly in the trade or business of the furnishing or sale of -

(i) electrical energy, water, or sewage disposal services,

(ii) gas through a local distribution system,

(iii) telephone service, or

(iv) telegraph service by means of domestic telegraph operations (as defined in section 222(a)(5) of the

Communications Act of 1934, as amended; 47 U.S.C., sec. 222(a)(5)),

if the rates for such furnishing or sale, as the case may be, have been established or approved by a State or political subdivision thereof, by an agency or instrumentality of the United States, or by a public service or public utility commission or other similar body of any State or political subdivision thereof."

3. The Internal Revenue Code of 1954, as amended, as it appears at 28 U.S.C. 48 (a)(1)(1964)

"Sec. 48 (a) Section 38 Property.-

(1) In General.- Except as provided in this subsection, the term "section 38 property" means-

(A) tangible personal property, or

(B) other tangible property (not including a building and its structural components) but only if such property-

(i) is used as an integral part of manufacturing, production, or extraction or of furnishing transportation, communications, electrical energy, gas, water, or sewage disposal services, or..."

4. 28 C.F.R. §1.46 3(g)(4)(i)

"(4) (i) With respect to properties of a taxpayer engaged in both the production or transmission of gas and the local distribution of gas, section 38 property shall be considered as used predominantly in the trade or business of the

furnishing or sale of gas though a local distribution system if expenditures for such property are chargeable to any of the following accounts under either the uniform system of accounts prescribed for natural gas companies (class A and class B) by the Federal Power Commission, effective January 1, 1961, or the uniform system of accounts for Class A and B gas utilities adopted in 1958 by the National Association of Railroad and Utility Commissioners (or would be chargeable to any of the following accounts if the taxpayer used either of such systems):

(a) Accounts 360 through 363, inclusive (Local Storage Plan), or

(b) Accounts 374 through 387, inclusive *Distribution Plant)."

5. 28 C.F.R. §1.48-1(a)

"Definition of section 38 property.-(a) In general. Property which waulifies for the credit allowed by section 38 is known as "section 38 property". Except as otherwise provided in this section, the term "section 38 property" means property (1) with respect to which depreciation (or amortization in lieu of depreciation) is allowable to the taxpayer, (2) which has an estimated useful life of 4 years or more (determined as of the time such property is placed in service), and (3) which is either (i) tangible personal

property, (ii) other tangible property (not including a building and its structural components), but only if such other property is used as an integral part of manufacturing, production, or extraction, or as an integral part of furnishing transportation, communications, electrical energy, gas, water, or sewage disposal services by a person engaged in a trade or business of furnishing any such service, or is a research or storage facility used in connection with any of the foregoing activities, or (iii) an elevator or escalator which satisfies the conditions of section 48(a)(1)(C). The determination of whether property qualifies as section 38 property in the hands of the taxpayer for purposes of the credit allowed by section 38 must be made with respect to the first taxable year in which such property is placed in service by the taxpayer. See paragraph (d) of §1.46-3. For the meaning of "estimated useful life", see paragraph (e) of §1.46-3."

6. 28 C.F.R. §1.355-1(c)

(c) Active business. Section 355 is not applicable unless the controlled corporation and the distributing corporation are each engaged in the active conduct of a trade or business. For specific rules in this connection see section 355(b)(1) and (2). Without regard to such rules, for purposes of section 355, a trade or business consists of a specific existing group of activities being carried on for the purpose of earning income or profit from only such

group of activities, and the activities included in such group must include every operation which forms a part of, or a step in, the process of earning income or profit from such group. Such group of activities ordinarily must include the collection of income and the payment of expenses. It does not include -

(1) The holding for investment purposes of stock, securities, land or other property, including casual sales thereof (whether or not the proceeds of such sales are reinvested),

(2) The ownership and operation of land or buildings all or substantially all of which are used and occupied by the owner in the operation of a trade or business, or

(3) A group of activities which, while a part of a business operated for profit, are not themselves independently producing income even though such activities would produce income with the addition of other activities or with large increases in activities previously incidental or insubstantial.

7. 28 C.F.R. §1.355-1(d) Example 12.

"1.355-1(d) The following examples illustrate the application the rules described in paragraph (c) of this section:

"Example (12). Corporation M is engaged in the manufacture and sale of steel and steel products. In addition, Corporation M owns and operates a coal mine for the sole purpose of

supplying its coal requirements in the manufacture of steel. It is proposed to transfer the coal mine to a new corporation and distribute the stock of such new corporation to the shareholders of Corporation M. The activities of Corporation M in connection with the operation of the coal mine do not constitute a trade or business, since such activities are not themselves independently producing income although a part of the business operated for profit."

8. Technical Explanation of the Bill appended to S. Rept. No. 881, 87th Congress, 2d. Sess. (1962) 1962-3 C.B. 843,859.

"Property is to be considered as being used as an integral part of a system of furnishing transportation, communications, electrical energy, gas, water, or sewage disposal services only if such property is used by one engaged in the trade or business of furnishing such services."

SPECIFICATION OF ERRORS RELIED UPON

1. The Tax Court's application of 28 U.S.C. 48 (a)(1)(B)(i) 964) is in error in that it requires that a multi-faceted siness prove the existence of separate and distinct businesses a condition precedent to the allowance of the investment credit.

2. Assuming for purposes of discussion that a multi-faceted siness must prove the existence of separate and distinct busi- sses as a condition precedent to the allowance of an investment edit for property described in 28 U.S.C. 48(a)(1)(B)(i), (1964), e Tax Court erred in concluding that appellants were not engaged a trade or business of furnishing electrical energy, gas, ter and sewage disposal services.

Questions Presented

1. Whether it was the intent of Congress that the provisions 28 C.F.R. §1.355-1(c) be incorporated into 28 U.S.C 48 (a)(1) 964) as the standard to be applied in questions relating to e term "***by a person engaged in the trade or business of rnishing any such service***."

2. Assuming that Question 1 is decided in favor of applying e provisions of 28 C.F.R. §1.355-1(c) in questions involving U.S.C. 48 (a)(1), (1964),whether the stipulated facts prove at appellants were engaged in the trade or business of furnishing lectrical energy, gas, water and sewage disposal services.

SUMMARY ARGUMENT

The Treasury Department issued interpretive regulations or 28 U.S.C. 46 (C)(3)(1964), Internal Revenue Code of 1954, amely, 28 C.F.R. §1.46-3 (g)(4)(i) which cover the subject f classifying property either as public utility property or roperty other than public utility property. The regulation s to be applied in businesses which operate both public utility nd non-public utility enterprises. These regulations tend o indicate that the stringent requirements of 28 C.F.R. §1.355-(c) need not be met in order to have separate trades or businesses or purposes of 28 U.S.C. 46. Specifically, it appears from 8 C.F.R. §1.46-3 (g)(4)(i) that the requirement in 28 C.F.R. .355-1(c) (as exhibited in 28 C.F.R. §1.355(d) Example 12) hat a group of activities carried on as part of a larger enter-rise must themselves independently produce income, is not ncorporated into 28 U.S.C. 46, (1964). Further, it is logical o assume that since 28 U.S.C. 46 (1964) and 28 U.S.C. 48 (a)(1) 964) are part of a group of sections enacted at the same time o effect the investment credit, Congressional intent, as interpre-ed by the Treasury Department in their regulations, would be he same for both of those sections (46 and 48), therefore, 8 C.F.R. §1.355-1(c) would have no application in questions nvolving the interpretation of 28 U.S.C. 48 (a)(1) (1964) and he appellants would not be required to prove that they operated he four systems at their mobile homes park separately or at

a profit to qualify for the investment credit. This view, ith some modifications, was expressed in the concurring opinion f Judge Tannewald.

Assuming for purposes of argument that the standards of 8 C.F.R. §1.355(1)(c) are applicable to the situation here, ne appellants meet the test with respect to three of the systems n issue because those systems were independently producing income s is illustrated by the water system which on the stipulated acts could have earned as much as $1,339.00.

ARGUMENT

I. The regulations and legislative history contain no requirement that Congress intended to restrict the investment credit by limiting the credit for property otherwise qualifying under 28 U.S.C. 48(a)(1) (1964) to those instances where an integrated business could prove that the assets in question were operated as a separate business and with a profit motive.

A. The "clearly erroneous facet of Rule 52(a) of the Federal Rules of Civil Procedure is not applicable where the trial court must apply a legal standard to undisputed facts.

In Lundgren v. Freeman, 307 F.2d 104 (CA-9, 1962), the ourt set forth the rule that in those situations where a trial ourt is applying a legal standard to undisputed facts, the onclusion of the trial court with respect to the application f the legal standard is not shielded by the clearly erroneous acet of Rule 52(a) of the Federal Rules of Civil Procedure.

Under the above cited rule, the threshhold question is ether the trial court was applying a legal standard or was rawing inferences from having had "experience with the mainsprings of human conduct".

It is submitted that the question of whether the appellants ere engaged in a trade or business of furnishing electrical nergy, gas, water, and sewage disposal service, involving as

t does terms of art (trade or business) with special meaning
n tax law, calls for the application of a legal standard. To
ut it another way, experience with the mainsprings of human
onduct in and of itself would not qualify a trial court to
pply the statute here in question because the statute contains
standard with special meaning in tax law.

For the foregoing reasons, the decision of the Tax Court
s not shielded by the clearly erroneous facet of Rule 52(a).

B. 28 C.F.R. §1.48-1(a), Income Tax Regulations, which contains the requirement that property used as an integral part of furnishing electrical energy, gas, water, or sewage disposal services, qualifies for the investment credit only if the owner of the property is engaged in the trade or business of furnishing any such service, does not contain a requirement that the trade or business of furnishing those services be separable from the other business activities of the taxpayer.

The controversy in this case arises out of the proper interpre-
ation of 28 U.S.C. 48(a)(1)(B)(i) (1964) Internal Revenue Code
f 1954) (hereinafter for convenience referred to as the "code
ection in issue"). The code section in issue contains no reference
o the requirement that the owner of property used as an integral

rt of furnishing electrical energy, gas, water and sewage sposal service (hereinafter for convenience referred to collectely as "the four services") be engaged in a trade or business furnishing such services. The requirement that a taxpayer st be engaged in a trade or business of furnishing such service pears in 28 C.F.R.§1.48-1 (a). The validity of the aforementioned gulation was challenged in the Tax Court on the ground that added an additional requirement not found in the code section issue, however, the Tax Court determined that the regulation s a reasonable interpretation of the statute based upon statements de in the Technical Explanation of the Bill, appended to S. pt. No. 1881, 87th Congress 2d Sess.(1962), 1962-3 C.B. 843, 9 (R.73).

The threshhold question which must be answered in applying C.F.R. §1.48-(a) is whether the taxpayer conducting an integrated siness consisting of many facets must be able to prove that he four services" or any one of them constitute a group of tivities which would qualify under the criterion established 28 C.F.R. §1.355-1(c). Without specifically stating that ey were doing so, the Tax Court Judges applied the standards t forth in 28 C.F.R. §1.355-1(c), this fact is recognized d referred to by Judge Tannewald in his concurring opinion -78) when he refers to Edmund P. Coady, 33 T.C. 771 (1960) fd. 289 F. 2d 490 (C.A. -6, 1961).

It is recognized that it is impossible for Congrees to
oresee the many varied circumstances in which a statute will
ecessarily have to be applied and to provide minute instructions
n the statute itself or as supplemented by statements of its
ntent in committee reports. It is, however, reasonable to
ssume that Congress in drafting the various related sections
nich make up the investment credit had carryover inten-
ons with respect to all the related sections which were drafted
the same time.

As a result of the lower rate of investment credit allowed
or public utility property by virtue of 28 U.S.C. 46(c)(3), (1964),
l code section citations refer to the Internal Revenue Code of
954), the Treasury Department in interpreting the intent of
ongress foresaw that there would be problems in classifying
ne property of an integrated business which was engaged in
perating a public utility. In order to set guide lines for
lassifying property owned by such integrated businesses engaged
n a public utility activity, the Treasury Department promulgated
3 C.F.R. §1.46-3(g)(4)(i) which states in part as follows:

"With respect to properties of a taxpayer engaged in both the production or transmission of gas and the local distributic of gas, section 38 property shall be considered as used predominantly in the trade or business of the furnishing or sale of gas through a local distribution system if expendi- tures for such property are chargeable to any of the follcwing accounts***".

The importance of this quotation is that it indicates that ne Treasury Department, in interpreting the code, recognizes nat differing situations will exist within the framework of ne business, however, it does not set forth the elaborate standards ontained in 28 C.F.R.§1.355-1(c) to determine whether separate usinesses exist, likewise does it incorporate those standards n any manner. The complete absence of any standards for determi-ing whether the utility business is separate from any other ctivity of the taxpayer, would logically tend to indicate that nese sections of the code viz., 38,46,47 and 48 are not to be overned by the strict standards of 28 C.F.R. §1.355-1(c).

One of the examples of the application of 28 C.F.R. 1.355-1(c) is Example 12 in 28 C.F.R.§1.355-1(d) which reads s follows:

"Example (12) Corporation M is engaged in the manufacture and sale of steel and steel products. In addition, Corporation M owns and operates a coal mine for the sole purpose of supplying its coal requirements in the manufacture of steel. It is proposed to transfer the coal mine to a new corporation and distribute the stock of such new corporation to the shareholders of Corporation M. The activities of Corporation M in connection with the operation of the coal mine do not constitute a trade or business, since

such activities are not themselves independently producing income although a part of the business operated for profit".

When Example 12 above is compared with that portion of 3 C.F.R. §1.46 3(g)(4)(i) quoted above, it can readily be observed hat the stringent requirements of 28 C.F.R. §1.355-1(c) are ot applicable to 28 U.S.C. 46 (1964) nor the code section in ssue. To elaborate on the comparison between the two sections f the regulations, there would be different results from their espective application in a situation where a business was ngaged in the production of gas and the gas was marketed olely through a local distribution system. . The production hase of the business would not be considered a separate business nder 28 C.F.R. §1.355-1(c) and (d) Example 12, because those ctivities carried on in the production phase would not themselves e "independently producing income". However, under 28 C.F.R.§1.46 §(g)(4)(i) the production phase of the business would be treated ifferently for investment credit purposes from the local distribu-ion phase of the business.

It is obvious from the above comparison that Congress did ot intend to incorporate into 28 U.S.C. 46 (1964) the stringent equirements set forth in 28 C.F.R. §1.355-1(c), likewise, it ppears logical that in drafting the related code section, 28 .S.C. 48(a), (1964),Congress did not intend to incorporate ithin it the requirements of 28 C.F.R. §1.355-1(c).

For the foregoing reasons it is clear that the Tax Court applied an incorrect legal standard to the undisputed facts in arriving at its decision.

At this point, it would be well to point out that in his concurring opinion, which was acquiesced in by Judge Raum, Judge Tannewald, after indicating a hypothetical situation in which he would allow the credit, stated that the taxpayers in his hypothetical would be entitled to the investment credit - "***whether or not they operated such systems separately or at a profit***" (R.79).

In one of his hypothetical illustrations (R.79) Judge Tannewald made but one distinction between the operation of three of the systems in the instant case and the hypothetical. The sole distinction was whether the operator of a mobile home park had an inventory. The reference here is to Judge Tannewald's illustration of a taxpayer purchasing and storing bottled gas and then selling the gas to mobile home owners. The facts in the instant case involve electrical energy, gas and water which are not normally stored, therefore, the appellants could never have an inventory, however, it is submitted that if the appellants had been aware of the thinking of Judge Tannewald and had pointed out to him the thinness of his distinction, he would undoubtedly have joined Chief Judge Drennen and Judge Featherston in their dissent.

The correct interpretation of the code section in issue s as stated by Judge Tannewald, that where a taxpayer is "furni- hing" electrical energy, gas, water and sewage disposal services s part of a unified or integrated business, the particular axpayer involved is engaged in the trade or business of furni- hing such services whether or not such services are operated eparately or at a profit.

In the instant case the mobile home park is a separate ntity economically and geographically, and appellants are engaged n a trade or business of furnishing electrical energy, gas nd water and providing sewage disposal services for the separate conomic and geographic entity as is indicated in the stipulation f facts (R.19-21). In any event it would appear to be a strained onstruction of the statute to hold that the appellants who urchase electrical energy, gas and water at one rate, distribute hese items through their own wholly owned and maintained system, harge, bill and collect from the customers at a higher rate, re not engaged in a trade or business of furnishing any such ervices.

II. The stipulated facts prove that the appellants were engaged in a trade or business of furnishing electrical energy, gas, water, and sewage disposal services.

The stipulation of fact, at 4(b)(R-17) indicates that each f the mobile home owners was charged $2 per month for water

and that the appellants paid $50 per month for the water. Stipulation 3(R-16-17) indicates that the water system cost $12,500.

Based on the aforementioned stipulated facts, the following table indicates the profit to be realized by the taxpayer from the sale of water:

Gross revenue ($2 x 111 x 12 months)		$2,664.
Cost of water ($50 x 12 months)	$600	
Depreciation ($12,500 divided by 20 years)	625.	
Total costs		1,225
Net profit from sale of water		$1,339.

Based upon the foregoing analysis of the stipulated facts, it is clear that the appellants operated the water system at a profit, therefore in accordance with the standards set forth in the Tax Court's opinion, appellants were engaged in the trade or business of furnishing water.

The Tax Court at page 9 of their opinion (R.73-74) state as follows:

"***The stipulated facts merely show that petitioners read meters, maintained the appropriate records, and billed the mobile home owners in Opal Cliffs for the various utilities services used***:. This particular summation of the facts is inaccurate inasmuch as the appellants owned the entire distribution systems for electrical energy, gas and water in the geographical area which made up their mobile homes park, and also owned the sewage disposal system in the geographical area of their mobile homes

ark. This is so stipulated. In addition, it is stipulated
iat the appellants purchased the electrical energy, gas and
ater from other sources and paid for it at a fixed price (R.
-19). The appellants in turn supplied the electrical energy,
s and water to the mobile home owners in Opal Cliffs Mobile
mes Park and charged them a different rate than that paid by
e appellants.

These activities when taken together, constitute all of
e elements of a trade or business except one, namely, the
ofit motive. The profit motive is clearly exhibited for
e water system, and it is submitted that the stipulated facts
th respect to the gas and electrical energy systems permit
other conclusion than that the appellants intended to make
profit from those systems. If there had been no profit motive,
e work involved in maintaining the meters, reading them
nthly and billing each mobile home owner separately would have
en idle acts when it is considered that the appellants could
ve dispensed with those activities.

If the Tax Court had correctly applied the legal standard
ich they selected, their conclusion should have been that the
pellants were entitled to the investment credit under 28 U.S.C.
(a)(1).

CONCLUSION

The Tax Court applied an erroneous legal standard in holding that the appellants were not engaged in a trade or business of furnishing electrical energy, gas, water and sewage disposal services. When the correct standard is applied, it is readily ascertainable that appellants were engaged in the trade or business of furnishing the services in question. Likewise, assuming that the legal standard applied by the Tax Court was correct, the evidence clearly indicates that the appellants met the standard.

For the foregoing reasons, the Tax Court decision should be reversed with directions to abate the deficiences and refund the tax, all of which has now been paid.

Respectfully submitted,

NOLAND, HAMERLY, ETIENNE & FULTON

By Martin J. May
Martin J. May

APPENDIX

Table of Exhibits

Exhibit Number	Received as Evidence
1-A	R. 16
2-B	R. 16
3-C	R. 18
4-D	R. 18
5-E	R. 19
6-F	R. 19

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

MARTIN J. MAY

Martin J. May